IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

UNITED STATES OF AMERICA, Plaintiff in Error, vs. THEODORE WEISBERGER and MAUD WEISBERGER, his wife, and EMPIRE STATE SURETY COMPANY, a Corporation, Defendants in Error.	No. _____

BRIEF OF DEFENDANTS IN ERROR.

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Southern Division.

PARKER & RICHARDS,
Attorneys for Defendants in Error.

STATEMENT.

In the year 1906, the plaintiff, under the provisions of the Act of Congress approved June 17th, 1902, through its Secretary of the Interior, authorized and directed the construction of what is known as the Tieton Reclamation Project, for the diversion of waters from the upper tributaries of the Natchez River for the purpose of irrigating lands in Yakima County, State of Washington, lying north and west of the City of North Yakima. Said Reclamation Project involved the construction of a dam at Bumping Lake to impound flood waters, the construction of a main canal about twelve miles long from a point on the Tieton River about fifteen miles above its junction with the Natchez River to a point in section ten, township fourteen, N., R. sixteen E. W. M., together with the necessary laterals and distributing ditches for conveying the water to the lands to be irrigated.

The matters in controversy in this action grew out of a contract let in connection with the construction

of this main canal, which is shown on Drawing No. 2 of Plaintiff's Exhibit 1, and the enlarged map therefrom introduced by defendants in evidence as Exhibit Q. This canal is about eleven miles in length, consisting of 49,494 feet of open canal and 7,752 feet of tunnels, nearly all of which is lined with concrete.

In laying out the work, the Government officials divided the construction of the main canal into seven parts designated as "Schedules," and provided for two forms of construction, which were designated Schedules A and B; the form of construction as decided upon and which was carried out approximately, is shown in the Schedules 1A to 7A, pages 35 to 48 inclusive of Plaintiff's Exhibit 1.

Schedule No. 1 included the building of the dam and head-works for diverting water from the Tieton River into the canal. Schedule No. 2 included the open canal excavation from the end of Division 1 to Station 200, as located on the canal; in this division there was included one tunnel known as Steeple Tunnel. Schedule No. 3 provided for the excavation of the canal from Station 200 to Station 375. In this division there are two tunnels known as Trail Creek and Log Slide tunnels. Schedule No. 4 provided for the excavation of the canal from Station

375 to Station 345. In this schedule there are four tunnels, two long ones known as Columner and Weddle tunnels. Schedule No. 5 provided for the construction of the canal from Station 545 to Station 650. The plans as originally outlined contemplated the construction of several flumes and also there were, in Schedules 1 and 2, some sections of unlined canal. The profile of the canal is shown on Drawing No. 5-A attached to Plaintiff's Exhibit 1, which gives all of these matters in detail. On Drawings No 6A and 7A are shown the manner in which the canal and tunnels are to be excavated. The specifications as to their construction are set forth on pages 35 to 43 inclusive in said Exhibit 1.

The method of lining the canal as provided for in the Government specifications was, by what are called in the contract and throughout the testimony, "concrete shapes," to be manufactured and placed in the canal after the same had hardened. Schedules 6-A and 7-A, set forth on pages 43 to 48 both inclusive of Plaintiff's Exhibit 1, give the specifications for the construction and laying of these shapes. Drawings No. 8-A, 9-A, 10-A and 11-A give the details of their construction.

On September 19th, 1906, the Government advertised for bids for the construction of these various

divisions or schedules of this main canal. No bids were received for any portion of the work except that of defendant, Weisberger, who bid for Schedules 6-A and 7-A (Transcript pages 180 to 184). The Government never succeeded in letting any other portion of the work by contract and, after several attempts, undertook the construction of Schedules 1, 2, 3, 4 and 5 by what is commonly called "force account."

In December, defendant Weisberger was advised by the Project Engineer that the acceptance of his bid would be recommended and that he would get the contract for the work under Schedules 6-A and 7-A. The contract, which is introduced in evidence as Plaintiff's Exhibit 1, was signed by Weisberger on January 5th and by the Government on January 24th, 1907 (Transcript p. 185). Attached to this contract and made a part thereof, was a book of maps, profiles and drawings, giving the outline of the canal and the details of construction. These are the drawings above referred to.

As above stated, the Government undertook, itself, the work to be performed under Schedules 1, 2, 3, 4 and 5-A. Before defendant, Weisberger, could do any work under Schedules 6-A and 7-A, it was necessary that the Government should have com-

menced and completed, ready for the laying of shapes, such portion of the canal as it desired the shapes to be placed in at any given time. The contract further provided (Plaintiff's Exhibit 1, pages 34 and 36, Sections 34 and 47A), that the right of way for all works, ditches, etc., should be provided by the United States; **that before it should become necessary for the contractor to begin construction under the contract,** "the **United States** will build a wagon road in the Tieton Canyon to the diverting dam approximately as shown on Drawing 2, and also make suitable improvements in the existing road." In Section 96 of the contract (Plaintiff's Exhibit 1), it was provided that the work of manufacturing the concrete shapes should be executed at various points in the bottom lands of the Tieton Canyon, as shown on Drawing No. 2 and marked "Locations 1, 2, 3 and 4," these being the sites which the Government engineers had selected and designated for that purpose. Before bidding on the contract, Weisberger made a trip up the canyon and examined these sites (Transcript pages 174-177).

The road which the Government agreed to construct was never completed to the diverting dam nor to within a mile and a half thereof, nor was it completed so that Weisberger could use it to get his

machinery and appliances up to the point where the first shapes were to be manufactured, until about the 1st of July, 1907. After that, the road was subsequently blocked by the Government employees throwing out rock and debris from the canal which they were constructing above the road (Transcript Weisberger, p. 192; Dimmick, p. 256-257; Cary, p. 270). Between the time when the map, Drawing No. 2, was prepared and bids made for the work, and the time when the work commenced, there was a flood in the Tieton Canyon and the sites which the Government had designated for the manufacture of the shapes were destroyed. This greatly hampered the contractor in carrying on the work (Transcript Heney, p. 163-164; Weisberger, p. 178).

Under the provisions of the contract as originally let, the work under Schedule 6-A was to be completed on or before November 1st, 1907, and the work under Schedule 7-A on or before March 1st, 1907. The time of completion of the work was subsequently extended (See Defendant's Exhibit H, Transcript p. 65), to August 1st, 1908, for Schedule 6-A, with an additional sixty days for curing the shapes, and October 15th, 1908, for Schedule 7-A.

As soon as he was advised that his bid would be accepted and the contract awarded him, and before

the contract was signed, Weisberger commenced work in assembling his material, preparing his plant, etc.. As shown by his evidence (Transcript, p. 186 et seq.), he prosecuted the work as rapidly and as diligently as circumstances would permit. The Government commenced the work of constructing the open canal, in which the shapes were to be placed, at the diverting dam at the head of Division 1. The first portion of the canal that was made ready for receiving shapes by the Government began at Station 10, as shown on the profile on Drawing No. 5-A. Weisberger had necessarily to commence the manufacture of shapes near this point and his first plant had to be established at Location No. 4, as shown on Drawing No. 2.

As provided in Schedule 6-A, the shapes were to be made of concrete, manufactured from the sand and gravel found at or near the points designated by the Government for manufacturing sites, and reinforced with steel rods running around and lengthwise of the shapes. (Ex. 1, p. 43, drawing 8A.) The first appliance necessary for commencing work would be a crusher to break the gravel into proper sizes, then concrete mixers, steel forms, engines or motors and other heavy appliances, necessary for such work. Weisberger was not able to get his ma-

chinery on the ground at the first manufacturing site until after the 1st of July owing to the failure of the Government to build the road. His evidence shows that he proceeded with due diligence in setting up his plant and manufacturing the shapes, until the work was ordered stopped by the Government engineers on November 7th (See Defendant's Exhibit N, Trans. p. 69). When a portion of the shapes were manufactured and tested it developed that the shapes were not as rigid as the Government engineers expected and developed cracks when raised, and the contractor was advised by letter from the District Engineer, dated October 22nd, 1907, (Defendant's Exhibit O, Trans. p. 72), to wait until the handling of the shapes could be considered by him and the Supervising Engineer, before the actual laying thereof should be begun. The contract provides (Plaintiff's Exhibit 1, p. 47, Sec. 120-A): "The contractor shall commnece laying standard shapes in position in the trench and in tunnels not later than fifteen days after receiving written notice by the engineer to begin work." No such notice was ever given (Trans. p. 227). At the time the contractor was ordered to stop manufacturing shapes on account of the weather, he had made 3216 shapes sufficient to line 1 1-6 miles of

canal. At that time, the Government had only 1¼ miles of canal ready for lining (Transcript, p. 220).

As shown by the specifications (Plaintiff's Ex. 1, p. 42 to 48), and testimony of D. C. Heney, one of the Government engineers (Transcript pp. 149 ,167 and 168), the shapes for the open canal were to be a little more than a half circle with a cross-bar across the top to strengthen them, eight feet 3 5-8 inches in diameter with walls four inches thick. The shapes for tunnel lining were to be circular rings six feet 1¼ inches in diameter. These large and unwieldy shapes were to be manufactured in the open country on the rough ground naturally constituting the bed of the Tieton River, some fifteen miles from the nearest railroad station. They were to be laid in the canal so as to practically fit together and jointed with a joint only one-eighth of an inch in width (See Transcript, p. 160, Exhibit 1, Drawings 8-A and 10-A), and the joints finished to a smooth, flush surface (Sec. 123-A, Exhibit 1). The shapes were to be constructed and laid according to the specifications and requirements of the Government engineers, and the work completed in a thorough, workmanlike manner by skilled mechanics, and in accordance with the specifications and drawings attached to the contract, and satisfactory to the engineer in charge (See contract, Ex. 1,

p. 31, Sec. 20, p. 35, Sec. 39-A). The engineer in charge at first required these shapes to be made practically perfect, allowing a variation of only 1-16 of an inch in the radius of any shape. Afterwards this was increased to 1-8 of an inch. It developed in the construction of these shapes that, owing to the thinness of the walls as compared to their size, and their consequent weakness and flexibility, it was practically impossible to construct the shapes to conform to these requirements, and lay them in the canal and join them closely, as required by the specifications (Trans., Weisberger, p. 206 to 215; Crownholm, p. 301-306-307-312-313; King, p. 329-300-371; Bunch, p. 324).

This method of lining a canal was new and untried (Transcript, Heney, p. 166; Crownholm, p. 311; Doolittle, p. 285). No canal of this size had been lined in this manner and the whole scheme was practically experimental. A great deal of time was necessarily consumed by the Government engineers and Weisberger and his men in experimenting and endeavoring to devise the necessary appliances for making these large, heavy shapes, under the conditions attendant upon their manufacture, in such manner that they would conform to the requirements, and result in a canal with a smooth interior

surface, which would not have shoulders projecting for the formation of eddies, thus retarding the flow of water therein, and which would have the hydraulic functions specified on drawing 10A, Exhibit 1.

By the time the Government had any portion of the canal ready for lining, Weisberger had manufactured over 3000 shapes. When he began to place them in the canal he discovered the difficulties attendant thereon and that it was impossible to join the shapes as required by the specifications. He immediately made application for a change in the manner of constructing and jointing the shapes (Transcript, Heney, p. 152; Weisberger, p. 215-216). Weisberger first made his application to the local engineer and also sent a letter to the office of the Project Engineer. He then took the matter up with the Assistant Engineer and finally with the Chief Engineer of the Reclamation Service. No action was taken on this application for change and it was still pending and unacted upon when the Government suspended the contract (Transcript p. 216).

Section 27 of the Contract (Ex. 1) provides: "Changes at contractor's request.—Should the contractor by reason of conditions developing during the progress of the work find it impracticable to comply strictly with the specifications, and apply in

writing for a modification of structural requirements or methods of work, such change may be authorized by the Engineer, provided it be not detrimental to the work and be without additional cost to the United States."

After the work had been shut down in the Fall by the order of the Government engineers as above stated, while the application for change in the manner of construction and laying of the shapes was pending, while the extension of the contract was still in force and had nearly a year more to run, and the Government officials had lulled Weisberger into the belief that no suspension of the contract would be recommended and acting thereon he had expended large sums preparing for next season's work, when winter was on and it was impossible, owing to the depth of snow in the Tieton Canyon and the weather, to do anything under this contract, the engineers in charge recommended the suspension of the contract, and thereupon, Morris Bien, the Acting Director of the Reclamation Service, recommended to the Secretary of the Interior that the contract be suspended and that the Government take over the work, together with the machinery, tools, appliances, etc., which the contractor had on the work (Plaintiff's Exhibit 3). This recommendation was approved by

the Secretary of the Interior February 1st, 1908, while Mr. Weisberger was in the East endeavoring to get an interview with the Secretary of the Interior, and the equipment of the contractor taken possession of by the Government employees.

The Government thereupon took over the work and completed it, itself; finishing on October 15th, 1909, or about two years after the date on which the work was to be completed under the original contract (Transcript, Weisberger, p. 219; Crownholm, p. 311). In completing the work, the Government departed very materially from the plans and specifications outlined in the contract and which the government engineers were compelling Contractor Weisberger to comply with (Transcript, Davis, p. 128-130-131; Heney, p. 160-161; Crownholm, p. 304; King, p. 329-372; Stipulation as to Changes, Transcript 341).

As shown by the testimony referred to, when the Government undertook the work, it found, as had Weisberger, that it was impossible to make these shapes true to radius within 1-16 or 1-8 of an inch, and a variation of two or three times that amount was allowed. The form of the cross-bar was also changed to give more strength to the shapes. Instead of requiring the shapes to be brought prac-

tically together and jointed with a joint only 1-8 of an inch in width, the Government allowed whatever width of joint might be found necessary or practicable to make a smooth surface, the width of the joints ranging from 1½ to 6 inches. This made it practicable to so place the shapes that the line of the canal could be followed, and the projections arising in the interior, from the shapes not coming together evenly, could be overcome by beveling these joints. Many other changes were also made, as is shown by the stipulation as to changes which was agreed upon at the trial, among which was the changing of Log Slide Tunnel, 1000 feet in length, to open cut, increasing length to 2394 feet, Weddle tunnel 445 feet in length changed to open cut, tunnels at stations 515 and 530 changed to open cut, elimination of the flumes and the lining of one of the largest tunnels with monolithic lining instead of shapes; Trail Creek tunnel as changed being 3120 feet long.

The Government claimed that it cost to complete the work, $51,095.05 in excess of the price therefor which was to be paid Weisberger under the contract; for the recovery of which amount this action was brought against the defendant, Weisberger, and his surety, Empire State Surety Company.

Defendants denied that the contract was rightfully suspended or that any money whatever was due the Government and set up six affirmative defenses, the fourth, fifth and sixth of which were counterclaims against the Government for the taking of Weisberger's equipment, the rental of his warehouse and moneys due him under the contract. The other defenses were: First, that the Government having charged this money against the Tieton Water Users' Association, was not the real party in interest and could not recover herein. No proof was allowed under this defense by the Trial Court. The second affirmative defense alleged failure on the part of the United States to perform the contract on its part, the wrongful stopping of the work by the Government, and the taking of the contractor's equipment; that the act of the Secretary of the Interior in suspending the contract was taken under such a gross misapprehension and mistake regarding the facts that he failed to exercise an honest and unbiased judgment in the premises. The third affirmative defense sets up that there was a mutual mistake in the making of the contract; that it was impossible and impracticable for the defendant to perform the contract in accordance with its terms and conditions, (Transcript, p. 13 to 30).

The case was tried to a jury, who returned a verdict in favor of the defendant, on which judgment was entered.

ARGUMENT

The plaintiff in error assigns five errors which it claims the District Court committed in the trial of this cause. In their brief, counsel for plaintiff in error do not separately discuss these various assignments; but practically base their entire argument upon the question of the sufficiency of the evidence to sustain the verdict.

A large amount of evidence was submitted to the jury which raised several questions for their consideration, the more important being:

1. Did the Government perform the contract on its part so as to put it in a position where it could rightfully insist upon strict performance by the defendant, Weisberger?

2. Was the contract rightfully suspended?

3. Was the contract possible of performance?

4. Was there a mutual mistake of the parties in making the contract for lining the canal in the manner specified?

5. Did the Government perform the same work, after it suspended the contract, that Weisberger had agreed to perform?

But two of these questions were submitted by the Court to the jury (Trans. 392); the second and third, the third practically includes the fourth.

We will discuss the several assignments of error in their order.

The first assignment of error is unintelligible. No such motion as that mentioned in the assignment was ever made.

The second error assigned is a denial of plaintiff's motion for a directed verdict, made at the conclusion of all the testimony as follows: (Transcript, p. 384)

"Now, if the Court please, at this time the Government desires to make a motion for a directed verdict on the ground there is nothing in the evidence produced by the defendant which shows that the suspension of this contract was broad enough or that it was effected by anything that was untrue."

This motion only goes to the evidence regarding the suspension of the contract, it is not made a ground of the motion that there is no evidence to go to the jury on the other questions regarding which evidence had been received. Clearly, the Court could

not ignore all of the other evidence and order a directed verdict based on this motion as the case stood at the time it was made. If, as stated in the motion, there was not sufficient evidence to show that the suspension of the contract was wrongful (which of course we do not admit), there was evidence sufficient to sustain defendants' contention as to the other points which were in issue. After this motion was denied, the plaintiff in error went on with the trial and offered other evidence. In so doing it waived any error in the denial of the motion for an instructed verdict.

Adams vs. Pedermann Mfg. Co., 47 Wash., 484.

The third assignment of error is that the verdict is contrary to the evidence and against the law. If the plaintiff in error had desired to raised this question, it should have made a motion for new trial. Having failed to move for a new trial, under all the decisions and rules of practice, it waived its right to assert or contend that the verdict of the jury was contrary to the weight of the evidence or not warranted by the law of the case as given to the jury by the Court.

As the record stands the fourth and fifth assignments of error together present but one question for consideration, viz: Did the Trial Court err in

refusing to enter judgment for plaintiff in error, notwithstanding the jury had found for defendants in error. The whole argument of plaintiff in error is practically directed to this one proposition.

MOTION FOR JUDGMENT NON OBSTANTI VERDICTO

The Trial Court properly over-ruled the motion. In fact, the motion should not have been considered, because it was not made in time, and under the form of the motion itself the Court could not properly consider the suffiency of the testimony to sustain the verdict, but could only look to the record in the case.

The verdict was returned on February 23, 1912, the motion for judgment non obstanti veredicto was served and filed on the 29th of February, 1912. There is no statute of the United States and no statute of the State of Washington expressly defining this motion. The general rule in the states where such motion is allowable, is that it must be made immediately upon the coming in of the verdict or at least within the time allowed by the statutes of the state for filing a motion for a new trial. The Trial Court held that the motion was filed in time because within the limit of time for

filing a motion for new trial under the rules of the U. S. Circuit Court. We think the statute of the state should govern rather than the rule of the United States Court, as at the time the rule was made, the motion for judgment *non obstanti veredicto* was not recognized by the Courts of the United States as existing in the State of Washington. The right to make such motion was never clearly settled and defined until the decision in the case of Rowe vs. Standard Furniture Company, decided by the Supreme Court of Washington February2nd, 1906. The statute of the State of Washington on the subject of new trials is found in Remington & Ballinger's Codes and Statutes of Washington, Section 402:

"The party moving for a new trial must, within two days after the verdict of a jury, if the action was tried by a jury or two days after notice in writing of the decision of the Court of Referee, if the action was tried without a jury, file with the Clerk and serve upon the adverse party his motion for a new trial designating the ground upon which it would be made."

The motion as made (Transcript, p 50-51), is as follows:

"Comes now the above named plaintiff, United States of America, by Oscar Cain, Esq., United States Attorney for the Eastern District of Washington, and Ralph B. Williamson, Special Assistant to the United States Attorney for said District, and

respectively moves the Court for judgment according to the prayer of its complaint, notwithstanding the verdict of the jury in said cause.

"This motion is based upon the records in said case."

This is the old form of the motion under the common law practice and rule that such a motion goes only to the sufficiency of the record to sustain the verdict and can be granted only where it appears from the pleadings in the case, without consideration of the evidence, that the plaintiff is not entitled to the relief prayed for. It is an elementary principle that the evidence is no part of the record. Counsel for plaintiff in error did not make their motion on the ground that the evidence was not sufficient to sustain the verdict. This being so the court could not properly consider the evidence in passing on the motion but should have only looked to the record. Objection to the hearing of the motion on the above grounds was made at the time it came on for argument and was over-ruled by the Lower Court. (Transcrip, p. 56.)

Regardless of the foregoing reasons for over-ruling the motion, it could not be granted in any event. It is a well established rule in this Court, in the United States Supreme Court and in the Supreme

Court of the State of Washington, that a judgment non obstanti veredicto will not be granted where there is any evidence to sustain the verdict. It will not be granted because the verdict is contrary to the weight of the evidence or because it may be uncertain, unconvincing or conflicting.

United States vs. Gardner, (C. C. A. 9 Circ.); 133 Fed., 285;

Perkins vs. N. P. Ry., (C. C. A. 9 Circ.); 199 Fed., 712;

S. C. & P. R. Co. vs. Stout, 17 Wallace, 657, 664;

Roe vs. Standard Furniture Co., 41 Wash., 546, 550;

Weir vs. Seattle Elevator Co., 41 Wash., 657, 661;

Adams vs. Pedermann, 47 Wash., 485, 486;

Messir vs. McClain, 51 Wash., 140;

O'Conner vs. Forth, 58 Wash., 216;

23 Cyc., 779.

In the case of the United States vs. Gardner supra, this Court said:

"At common law, a judgment *non obstanti veredicto* could only be granted upon the application of the plaintiff and upon a plea to the declaration which confessed the cause of action and set up mat-

were sufficient to constitute a defense or a bar. The ma

ters in avoidance, which, upon their face, has been relaxed in most of the states so far as to permit a judgment on the pleadings notwithstanding the verdict in behalf of either the plaintiff or the defendant. We find no statute of Washington or decision of the Supreme Court of that State further relaxing the rule so as to permit the consideration of the evidence in the case."

Subsequent to the date of the above decision, which was in 1904, the Supreme Court of Washington, in the case of Roe vs. Standard Furniture Company, supra, established the rule that a motion by the defendant for judgment *non obstanti veredicto* should be granted where it appears that the plaintiff has no possible right to recover. We know of no decision in the State of Washington which has established the rule that such motion should be granted in favor of the plaintiff because of insufficiency of the evidence of defendant.

In all of the cases decided by the Supreme Court of the State of Washington, it has been held that the power of the Court to grant a motion for judgment is practically commensorate with its power to direct a non-suit; if there is any evidence sufficient to warrant submitting the case to the jury at all, the only remedy of the party who feels himself aggrieved by the verdict is to move for a new trial. If the trial court considers that the verdict is con-

trary to the evidence, or that the evidence preponderates in favor of the party against whom the verdict is given, then it should set aside the vredict and submit the case to a second jury; but it has no right to take the burden of deciding the facts upon itself.

In the case at bar, at the close of defendants' testimony, counsel for plaintiff moved to strike the evidence concerning the suspension of the contract. (Trans. p. 380.)

After all the evidence was in and both sides had rested, the plaintiff moved for a directed verdict in its favor. (Trans. 3. 384.)

Both motions were over-ruled and the case was submitted to the jury. After the return of the verdict in favor of defendant in error, plaintiff in error moved for judgment notwithstanding the verdict, which was denied. (Trans. p. 51.)

The case falls squarely within the decision in Perkins vs. N. P. Ry. Co., supra, decided by this Court last October. In that case, there was a motion at the close of plaintiff's testimony to take the case from the jury and dismiss it. At the close of defendant's evidence, a motion was made to direct a verdict in favor of the defendant. After the verdict was returned, a motion was made for judgment *non obstan-*

ti veredicto, which was granted. The judgment so entered was reversed.

In the opinion written by Judge Rosse, this Court says:

"As will be readily seen the Court below * * * * reached that conclusion by contrasting and weighing the evidence on behalf of the respective parties. In passing upon the motion which gave rise to the judgment complained of, the Court below had no right to weigh the evidence that had been given in the case and determine on which side it preponderated: on the contrary, it was bound to take the most favorable view for the plaintiff of the evidence on her behalf, and of all inferences that could be reasonably drawn therefrom by reasonable men, to the exclusion of the evidence on behalf of defendant," citing a number of cases.

Further on the opinion quotes with approval from the opinion of the Supreme Court of the United States in S. C. & P. R. vs. Stout, as follows:

"Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have, themselves, seen and heard, the merchant, the mechanic, the farmer, the laborer—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safe conclusions from admitted facts thus occurring than can a

single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given or whether they established negligence."

If that was the correct rule to apply in those cases, it should certainly control the case at bar. Here the defendant introduced several witnesses whose testimony covering two or three hundred printed pages, is amply sufficient to sustain the verdict; which testimony the plaintiff in no way attempted to refute or contradict. Surely the Trial Court was right in refusing to interfere with the verdict returned herein. If plaintiff in error was not satisfied with the verdict it should have filed a motion for new trial. In the light of the evidence that was the only manner in which the correctness of the verdict could be tested. No such motion was made, nor was any motion made prior to the submission of the case to the jury, which was sufficient to warrant the Court in taking the case from the jury. The case having been submitted to the jury and there being evidence to sustain their verdict, the plaintiff in error having made no effort to test the correctness of the verdict by a motion for a new trial cannot now be heard to say that the verdict was not according to the law and evidence or

that the judgment entered pursuant to said verdict should not have been entered.

There was unquestionably competent testsimony tending to establish the defenses of the defendant which was submitted to the jury. Whether this testimony was credible, presented questions of fact for the consideration of the jury and their verdict is binding upon the Court.

Erickson vs. McNeely & Co., 41 Wash., 509.

Rector vs. Bryant Lumber Co., 41 Wash., 556.

Voseberg vs. Michigan Lumber Co., 45 Wash., 670.

Campbell vs. Wheelihan Co., 45 Wash., 675.

Meser vs. McClain, 51 Wash., 675.

O'Conner vs. Force, 58 Wash., 215.

In the last case above cited, the Supreme Court of Washington, speaking through Judge Fullerton, says:

"We are still satisfied also that the appellants by their evidence made a prima facia case. This being so, the Trial Judge should not have denied them the right of trial by a jury on mere contradictory evidence, no matter what his own conclusions may have been as to weight of the evidence. If in his belief the evidence against the plaintiffs was so favorable, or overwhelming as to cause him to feel that the verdict of the jury amounted to a miscarriage of justice,

it was his province to set the verdict aside and submit the question to a second jury, but he had no right to take the burden of deciding the facts upon himself. The right of trial by jury is a constitutional right and is not to be denied the litigant who insists upon it and complies with the statutes relating thereto. In this instance, since no new trial is asked for, it is the duty of the Court to enter judgment in favor of the plaintiff on the verdicts."

At the trial of the case below, the Court withdrew from the consideration of the jury all but two questions; one—was the contract possible of performance at the time it was entered into; the other—was the Secretary of the Interior guilty of fraud in suspending the contract, or did he commit such a gross mistake that fraud on his part would be implied? (Transcript, p. 392.)

IMPOSSIBILITY OF PERFORMANCE OF CONTRACT

The first proposition which the Court submitted to the jury was whether or not the contract was possible of performance. Surely there was sufficient evidence on which the jury could decide this question in favor of the defendants.

The testimony of Mr. Heney, Mr. Weisberger, Mr. Doolittle and Mr. Crownholm, (Transcript, p. p. 166, 285, 311), shows that the method of lining the canal

was untried and that the form of construction adopted was an experiment on the part of the Government engineers. The testimony of Mr. Weisberger further shows (Transcript pages 207, et seq) that he spent two or three months trying to devise appliances by which he could make the concrete shapes so as to fulfill the requirements of the Government engineers; that after all of this experimenting and work was done, it was found impossible to construct these unwieldly shapes, with walls only four inches thick, so that they would be true to radius within the requirements of the Government engineers, and when it came to laying them in the canal it was impossible to joint them in accordance with the specifications so as to form a canal lining which would fulfill the requirements of the contract, or which would follow the line of the canal.

Mr. Crownholm, who is an engineer, and at the time of the trial was in the employ of the Government, and would naturally make his testimony as favorable as possible to the plaintiff, testified as follows: (Trans, p. 301.)

Q. Was it possible to make those shapes and place them ⅛ of an inch together and make a smooth joint or make an eighth inch joint?

A. No.

(Page 306.)

Q. But the practical result of trying to cast these shapes and joining them to an eighth of an inch, was that they would come together at some places and not at others, was it not?

A. Well, this bottom here would be up or down here (illustrating); it was necessary to move the shapes in this direction, or this way probably.

Q. And that would throw it out somewhere else?

A. It meant it would be in contact at one point and probably out an inch somewhere else.

Q. So it was practically impossible to make them touch all around to an eight of an inch?

A. It was unless we would have went back to the manufacturing and require a more exact diameter than what was being made.

(At Page 312, on cross-examination by plaintiff's counsel he testified:)

Q. Will you explain your statement regarding the possibility of joining the shapes as originally designed?

A. Why, in that I meant, of course, that it would be prohibitive cost from my point of view to line it with the eighth of an inch joint; that it was on account of economy that this other joint was adopted and on account of its being more substantial—more practicable.

(Page 313.)

Q. Well, but the irregularities that existed; you said it was apparently impossible for you to put those two shapes together without leaving a little ridge—that is, you could not make an absolute smooth space; was not the chief difficulty, the difficulty that you encountered, the laying or placing of those shapes in the canal rather than defective manufacture of the shapes?

A. I could not follow any prescribed lines unless the shapes were exact in length. Unless each seg-

ment was exactly 2 feet I could not follow any prescribed lines, because it would throw me off that line, don't you see? If I tried to keep an eighth of an inch joint all around.

(Chas. Bunce testified, Page 324.)

Q. But with your experience, all your experience in making those shapes there, were you able to get the radius and diameter within a sixteenth of an inch?

A. Well, you could get it, but you could not keep it there. If you would get it and set it, the next time you took it out it would vary—the spring and tension —the tension in the steel.

Q. Then it was practically impossible to keep it within a sixteenth of an inch?

A. And accomplish anything, yes.

(Herbert J. King, a disinterested witness, testified, page 325.)

Q. Did you encounter any difficulty in laying these shapes?

A. Well, in laying them to the satisfaction of the inspectors. We found it very nearly impossible.

Q. Was that more or less difficult to set the shapes as manufactured by Mr. Weisberger and set in the fall of 1907, than to set the shapes manufactured by the Government and which you assisted to set in 1909?

A. It was infinitely more difficult.

Q. In what did the difference in difficulty consist?

A. Well, it was found that the length of the sections was irregular, and if they were butted up together as required by the specifications to the one-eighth inch limit, that they would throw themselves out of line; in other words, they could not be kept in line and to the joint, as required, at the same time.

Q. How was that overcome, if at all, in the other joints used by the Government?

A. Why, the joints were widened so that they could be kept in line irrespective of the distance between the shapes.

Q. Now, in setting these shapes and attempting to join them with a sixteenth of an inch in radius, would or would not there be a ridge left inside the shape?

A. Well, there was, yes.

Q. And what was the result of that? What did the Government subsequently adopt to avoid that abrasion in the shapes?

A. Well, the off-set, as you might call it, was still present, but the width of the joint allowed the off-set to be tapered off, if I may express it that way; in other words, there was not the sharp projection that would be present in the other shapes.

Q. Now from the experience that you had there, Mr. King, what would you say as to whether or not it was possible or impossible to line that canal with shapes constructed as defendants' Exhibit "B," with the variation of one-sixteenth and one-eighth of an inch?

A. I should say it would be practically impossible.

(On cross-examination, page 330, by Mr. Williamson.)

Q. When you say "practically impossible," do you mean impossible or more difficult?

A. I thing "practically impossible" would cover it.

Q. You mean then that it was not practicable?

A. I mean even more than that.

Q. Not impossible? What do you mean?

A. Why I mean economically impossible.

(Mr. King being re-called testified, page 371.)

Q. Now Mr. King, in addition to what you said yesterday, when you came to lay these shapes in this canal and fit them to an eighth of an inch joint, what was the result as to being able to follow the line or grade of the canal?

A. Why we found that it was impossible to follow the line of the canal, and also impossible to follow the grade.

Q. You then found it impossible to lay those shapes in that way so as to make a proper lining for the canal?

A. In accordance with the inspection.

Q. And specifications?

A. And specifications.

Q. When you were laying for the Government what width did they make these joints?

A. Personally, I laid none. The joints were—

Q. You knew about them?

A. Yes sir, I jointed them. The joints ranged from on a tangent, from an inch and a quarter to an inch and three-quarters in width and on curves, on the outer side of the curve they ranged as high as 6 inches in places.

Defendants started to offer further proof on the subject of impossibility by another Government engineer, Guy Finley, but desisted on the suggestion of the Court that the subject had been sufficiently covered. (Transcript, pp 374-5.)

The Government offered no testimony in rebuttal to refute this testimony, though it had its chief engineer and a number of its assistant engineers present. As was said by the Supreme Court of the State of Washington, in Donaldson vs. Abraham, cited below:

"There was no contrary evidence introduced or offered, and the record contains nothing otherwise that tends to impeach the witness. We can see no reason therefore why we should not give his evidence the credit it seems on its face to deserve, and hold

that the bid was submitted through inadvertance and mistake."

In the case at bar, no attempt was made to impeach the testimony of any of these witnesses, nor to contradict it. The witness, Mr. Crownholm, is an engineer now in the employ of the plaintiff in error. We think that the jury were fully justified in accepting the testimony of the witnesses as true and in finding that the contract was impossible of performance in accordance with the specifications and the requirements of the Government engineers and inspectors. With this evidence before them, unimpachd and uncontradictd, we do not see how they could have found otherwise.

Evidence having been introduced that the contract was impossible of performance, and the jury having so found, Weisberger could not be held to the strict letter of the contract, the law will excuse him from its performance, and such excuse is sufficient to bar any recovery in this action by the Government.

C. M. & St. P Ry vs Hoyt, 149 U. S., 1, 15.

Moffit vs. Rochester, 178 U. S., 374.

Kinzer Construction Co. vs. State, 125, N. Y. S., 46.

Donaldson vs. Abraham, 68 Wash., 208.

In the case of the C. M. & St. P. Ry. vs. Hoyt,

above cited, the Supreme Court of the United States, speaking through Mr. Justice Jackson, says:

"There can be no question that a party may, by an absolute contract, bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance and such construction, is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened."

The cases cited by plaintiff in error on this point are all old cases. The tendency of the modern decisions is to depart from the harsness of the rule adopted in some of the earlier cases to the effect that a party will be held to the strict letter of his contract in any event.

The case of Kinzer Construction Co. vs. State, above cited, decided by the Court of Claims of New York, gives a very exhaustive discussion of this subject, cites a large number of cases, and lays down the rule as now applied by the courts. Judge Rodenbeck, in the opinion says:

"From these cases, it will be seen that a fourth ex-

ception must be made to the general rule that accident or contingency arising without the fault of either party will not excuse performance of an absolute executory contract, and the four exceptions may now be stated broadly as follows: First, where the legal impossibility arises from a change in the law; second, where the specific thing which is essential to the performance of the contract is destroyed; third, where by sickness or death personal services become impossible; and fourth, where conditions essential to performance do not exist. (Citing a number of cases to support each of the several propositions.) From these considerations, the rule may be deduced fairly in the present case that where in the course of the construction of a canal natural conditions of soil unexpectedly appear, which contingency the contract does not in express terms cover, and which render the performance of the contract as planned impossible, and make necessary substantial changes in the nature and cost of the contract and substantially affect the work remaining under contract, the law will read into the contract an implied condition when it was made that such contingency will terminate the entire contract. * * * *

"It would not have been fair of the state to insist upon the literal performance of its contract, and place the loss upon the claimant for the failure to perform, nor would it have been just for the claimant to insist that the state must carry out its contract as planned, or suffer the penalty of paying damages, including prospective profits for the breach of the contract. It is better to regard the contract as at an end and treat both parties as having been excused from further performance, allowing the claimant to recover for work done and for benefits received by the state under the contract down to the time of the discovery of the conditions which rendered performance impossible, and for such damages as may have resulted to it from the stop order issued by the state."

The method of lining the canal was devised by the Government engineers; they prepared the plans and specifications; Weisberger was justified in relying on the presumption that they knew what they were doing and that the shapes could be made and the canal lined as specified. It is apparent that both parties entered into this contract laboring under a mistaken belief that this could be done. The mistake and impossibility of performance did not become apparent until a large number of shapes had been manufactured and an attempt was made to line the canal with them. As it turned out the contract "is such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." It was an unequitable and unconscientious bargain and such as even in a Court of law will not be enforced according to its letter, but only so far as is equitable.

Hume vs. U. S., 132 U. S., 406.

If, by mutual mistake, a contract is founded upon a condition impossible of performance, there is no meeting of the minds of the parties in reality, and no condition can be enforced by either.

U. S. vs. Charles, 74 Fed. R., 142.

Nordick Marmon Co. vs. Kehlor, 155 Mo., 643; 56 S. W., 287.

Southern Iron Co. vs. Laclede Power Co., 109 Mo. App., 353, 84 S. W., 353.

King vs. Duluth, etc., R. C., 61 Minn., 483; 63 N. W. 1105.

Michand vs. MacGregor, 61 Minn., 198; 63 N. W., 479.

Meech vs. Buffalo, 29 N. Y., 198.

Cook vs. Murphy, 70 Ill., 96.

Fink vs. Smith, 170 Pa. St., 124; 32 Atl., 566.

Harrell vs. De Normandie, 26 Texas, 120.

Ketchum vs. Catlin, 21 Vt., 191.

Page on Contracts, Sec. 71 (and note);
9 Cyc., 353 (D).

The Government having prepared the plans and specifications, the contractor cannot be held responsible for defects therein.

Southerland on Damages, Sec. 701.

Counsel for plaintiff in error attempt to minimize the difficulties of performing the contract as originally made, and make light of the effect of the irregularities in the lining of the canal. On drawing 10-A is a schedule, headed "Hydraulic Functions,"

of the requirements of the construction as affecting the carrying capacity of the canal. In this table the requirement for the lined canal is stated N= .012. Interpreted this means that "the roughness of the interior of the canal is expected to be no greater than if lined with straight, unplained timber or equal in smoothness to ordinary iron pipe."

See Trautwine's Engineer's Pocket Book, 1907 Edition, p. 565.

Surely a lining with shoulders projecting an inch or more on the interior surface would not fulfill this requirement. Such irregularities figured out for the entire canal would reduce the velocity of the water as required by said schedule of Hydaulic Functions from 9.05 as given for lined canal to 6.336; reducing the carrying capacity of the canal very materially and making the lining unacceptable under the contract.

Much stress is laid by counsel for plaintiff in error upon a single question and Weisberger's answer thereto, as though such answer should overcome all the other testimony in the case and be taken as conclusive proof that the contract was possible of performance. The question was asked by the writer and he is free to admit that in view of the issues which were being tried, it was inartistically framed

and inadvertently put in the form in which it appears in the record (Trans. p. 339). Apparently, from the context, the questioner had in mind Weisberger's ability to go on with the contract with the equipment and means at his command. The question should have been put in different form or qualified by proper reference to the status of the work and the application for changes which was pending. As we all know, many of the questions asked in the heat of trial do not read as we would like them to when they appear in the record. It would be very unfortunate if the shortcomings of his attorney were to be visited upon the defendant to the extent of holding that this one question nullifies and sets at naught all that Mr. Weisberger himself and his witness said regarding the impossibility of the performance of the contract. We have no fear of such a ruling by this Court.

Counsel say that the impossibility was not a hidden impossibility. The evidence all shows that it was not discovered until the contractor commenced laying shapes in October after several thousand had been made.

Counsel say that no complaint was made regarding the road until the trial. This statement is contradicted by the record. Weisberger testified that

he protested about the road every few days (Trans. 229).

Counsel in attempting to analyze the testimony regarding the difficulties in manufacturing and joining the shapes have gotten somewhat mixed. No change was ever allowed in the manner of joining the shapes prior to suspension of the contract. The only change made was an allowance of an additional one-sixteenth of an inch for variation in the radius of the shapes manufactured under Schedule 6A, making one-eighth in all instead of one-half, as stated in Plaintiff's brief (Trans. 206). They state that a change in the width of the joint had been made before the contractor began laying the shapes. They are in error in this. The testimony on which they base the assertion says nothing about joints and nowhere in the record is there any testimony to substantiate their statement. Weisberger's application for change involved no departure from the plan of lining the canal except as it affected the joints (Trans. p. 236). True, he did not ask to be allowed to make wider joints, as was done by the Government when it did the work. But if the Government engineers did not approve his suggestion of a monolithic lining they could easily have made a suggestion of their own instead of refusing to consider the application at all.

SUSPENSION OF CONTRACT.

The provision of the contract as to suspension is found in Sec. 22, p. 32, of Plaintiffs' Exhibit 1:

"Should the contractor fail to begin the work within the time required, or fail to begin the delivery of material as provided in the contract, or fail to prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or if at any time the contractor is not properly carrying out the provisions of his contract, in their true intent and meaning, notice thereof in writing will be served upon him, and should he neglect or refuse to provide means for a satisfactory compliance with the contract, within the time specified in such notice, the Secretary of the Interior in any such case, shall have the power to suspend the operation of the contract."

The evidence shows that Weisberger commenced to perform the contract even before it was executed; that he prosecuted the work with due diligence and with all the means at his command. The first delay that occurred and the first default in the performance of the contract was on the part of the Government in failing to construct the wagon road to the diverting dam and to keep it open. The contract provided that this road would be constructed by the Government before the contractor should be required to commence work (Plaintiff's Exhibit 1, p. 36, Sec. 47-A). The evidence shows (Transcript pp. 192, 256-257, 270)

that the Government did not get this road constructed, so that Weisberger could get his machinery up to the first manufacturing site, until about the first of July, 1907, never completed it to the diverting dam, and frequently obstructed it so that it could not be used. As soon as he could get the machinery and plant installed, Weisberger commenced the manufacture of shapes. On August 30th, 1907, the engineer in charge, Joseph Jacobs (See Defendant's Exhibit M, Transcript p. 66), wrote to Weisberger expressing himself as satisfied with the progress of the work and stating that he would make no recommendation looking to the immediate suspension of the work. At this time there had only been sixty days during which Weisberger could manufacture shapes or would have been compelled to work at all if he had waited for the Government to comply with its agreement to build the road as provided in paragraph 47-A. Furthermore, it was the Government's duty to prepare the canal ready for the shapes, and as is shown by the testimony (Transcript p. 220), when the work shut down in the Fall, Weisberger had shapes enough manufactured to lay practically all of the canal which the Government had ready for lining.

On October 28th, the Acting Director advised Mr.

Weisberger that his contract had been extended to August 1st, 1908, for Schedule 6-A, with sixty days additional for curing shapes, and to October 15th, 1908, for Schedule 7-A (Defendants' Exhibit H, p. 65 of Transcript).

On November 4th, 1907, the engineer in charge notified Weisberger to discontinue the manufacture of concrete shapes at noon of November 5th, 1907 (Defendants' Exhibit N, Transcript, p. 69). The contract provides (Plaintiff's Exhibit 1, 120-A, p. 47) that the contractor shall commence laying standard shapes in position in the trench and in the tunnels not later than fifteen days after receiving written notice by the engineer to begin work, and he shall continuously prosecute the work until the portion which he has commenced shall be completed. No notice of this kind was ever served upon the contractor (Transcript, p. 204). On the contrary, on October 22nd, the District Engineer wrote Weisberger requesting him to delay the actual laying of the shapes until a conference could be had with the Supervising Engineer regarding the development of cracks therein (Defendants' Exhibit O, Transcript, p. 72). No other notice on this subject was ever given.

This was the condition of the contract at the close

of the season of 1907. Shortly after Weisberger shut down the work, a heavy snow-fall occurred in the canyon, and that, coupled with cold, freezing weather, made it impracticable and impossible to continue work under the contract. This condition of affairs continued until early in May, 1908. Notwithstanding the facts above set forth, on January 2nd, 1908, Charles H. Swigart, the Project Engineer, wrote a letter to defendant, Weisberger, as follows (Transcript, p. 64):

"North Yakima, Washington,
January 2nd, 1908.

Mr. Theodore Weisberger,
North Yakima,
Washington.

Dear Sir:

Referring to my letter of November 26th, 1907, and certain instructions dated December 27th, relating to the prosecution of your work upon Schedules 6-A and 7-A, your contract dated January 5th, 1907, for the construction of the Tieton Main Canal, Tieton Project, Washington, I hereby notify you that the work therein mentioned and ordered has not been done or begun, and that the work of delivery of materials provided for in said contract is not being prosecuted in such manner as to insure a full compliance therewith within the time limit or at all and in accordance with paragraph 22 of the specifications, I hereby instruct you as follows:

1. That on or before January 8th, 1908, you begin the work of making such molds as will insure full compliance with your contract.

2. That on or before January 8th, 1908, you begin

the delivery of cement in accordance with instructions hereinabove referred to.

3. That you make such financial arrangements in accordance with paragraph 37 of said specifications, as will satisfy the Engineer of your ability to properly carry out the provisions of the contract within their true intent and meaning, and that you furnish evidence of same to this office on or before January 8th, 1908.

Respectfully,
(Signed) CHARLES H. SWIGART,
Project Engineer.

The Court will bear in mind that this letter was written in the midst of winter, after the work had been shut down and months before it was possible to resume work in the Spring. At the time this letter was written the Government had obstructed the road so that it would have been impossible for Weisberger to comply with the engineer's demand (Transcript, p. 217). As to requirement No. 1, the testimony shows (Transcript, p. 218-219) that Weisberger had on hand 234 molds, and would need only about 100 more to prosecute the work, which could be made in 40 or 50 days; that it would only take about ten days to deliver the amount of cement which Swigart had theretofore directed the contractor to deliver. The third requirement was absolutely outside of the province of the engineer, or anyone else to make. There is no provision in para-

graph 37, or anywhere else, that the contractor shall make any showing of financial ability, except before the contract is let. The evidence shows (Transcript p. 351-357, 369) that Weisberger had never defaulted in any payments for labor or material, had ample credit to enable him to go on with the work and there had never been any cessation or delay in the work for lack of money with which to prosecute it.

Under the provisions of Sec. 22 of the contract, it is provided that if the contractor has failed to prosecute the work so as to insure a full compliance within the time limit, or is not properly carrying out the provisions of the contract, notice thereof will be served upon him; and should he neglect or refuse to provide means for satisfactory compliance, then the contract may be suspended. The letter from Mr. Swigart above set forth is absolutely the only notice that was ever served upon the defendant, Weisberger, under the provisions of this section, and the giving of a proper notice in conformity with this provision is a pre-requisite to the right of the Secretary of the Interior to suspend the contract. We submit that the letter above referred to was not such a compliance with the provisions of this section as to furnish a proper basis, or any basis at all, for the action of the Secretary of the Interior in suspending the

contract; that the attempt to give such notice at the time and under the circumstances, showed bad faith on the part of the Government engineers.

In fact we think but one conclusion can be arrived at from reading the testimony in the case, and that is that the reclamation officials and engineers in charge of this work had found that they had adopted an infeasible plan of lining the canal, that this fact was bound to come out in Weisberger's application for changes, which he was trying to get before the head officials and Secretary of the Interior, and that they could best protect themselves by suspending Weisberger's contract and taking over the work themselves. Jacobs began talking about suspension in August before Weisberger had barely had time to get under way. It must be borne in mind that Weisberger was not bound to begin work until the Government had completed the wagon road. This was not done until July 1st, which would give Weisberger only four months under the terms of the contract to complete the whole of Schedule 6A. This was an absolute physical impossibility, and recognizing this fact the contract had been extended. In making his recommendation for extension (Defendants' Ex. X, Trans. p. 77) Jacobs gives as reasons why the contract should be extended, the failure of the Govern-

ment to complete the road, inability of the Government to perform the work on Schedules 2A, 3A, 4A and 5A within the time specified and that Weisberger could not begin work on Schedule 7A until these other schedules were completed. Under these circumstances, it is a strange coincidence that the engineers should begin to discuss the suspension of the contract just after Weisberger had discovered the defects in the plan of construction and requirements of the engineers and began asking for modifications (Trans. 215).

The letter of the Acting Supervising Engineer (Defendants' Ex. W, Trans 74) shows the attitude of these officials and what they had in mind. The letter is dated September 27th, 1907, and says in part:

"As matters now stand, Weisberger's success or failure in his work rests practically on the action of the engineers. One may say he is almost wholly dependent on their favorable consideration and treatment, and it would appear to be a very unbusinesslike proceeding on the part of Weisberger himself to antagonize in any way the engineers by refusing to carry out so obviously reasonable an obligation and one which involves so small an expenditure."

This letter and the implied threat of suspension in Jacobs' letter, show the mental attitude of the engineers and brings out the fact that they considered

that, under the drastic provisions of the contact they had Weisberger at their mercy and could make or break him as they might see fit. Evidently when he began to criticise their plans and ask for changes, they decided to break him rather than have the defects and fallacies of the plans and method of construction aired in the department and before the public. We do not mean to infer that any of these men deliberately or maliciously planned to ruin Weisberger or injure him, but they were merely acting on the impulse of the first law of nature—self preservation. With the work in their own hands there would be no one to see or critisise the faults in the plans or to raise any question if they were not carried out as originally designed.

It was in the power of these men to have offered Weisberger the relief which he asked and of which the Government promptly took advantage after the ejection of Weisberger from the work. The fact that Weisberger presented his application for change to all the engineers from the lowest to the highest, and finally took it to Washington himself, but never received any relief, does not put them in a favorable light.

Thus the matter stood at the time the Acting Director wrote the letter recommending suspension

of the contract. We respectfully request a most careful perusal of this instrument by the Court and comparison of the statements therein contained with the uncontradicted testimony of the witnesses:

Department of the Interior, United States Reclamation Service, Washington, D. C. Office of the Director.

The Honorable, The Secretary of the Interior:

Sir: On January 5, 1907, contract was entered into with Theodore Weisberger for the construction and completion of Schedules 6A and 7A of the main canal, Tieton project, Washington, said work consisting of manufacturing, furnishing, distributing and laying concrete shapes. Schedule 6A was to have been completed on or before November 1, 1907, and Schedule 7A on or before March 31, 1908. On October 23, 1907, the time of completion of Schedule 6A was extended to August 1, 1908, and of Schedule 7A to October 15, 1908.

Work on Schedule 6A was not commenced until August 2, 1907, whereas it should have been well under way by that time had work been begun in the spring as required by the terms of the contract, and a similar condition prevailed in the commencement of work under Schedule 7A.

The contractor was repeatedly urged by the engineers to expedite the installation of his plant for the commencement of work on Schedule 7A, and on October 9 written directions were given him to begin laying shapes under that schedule, but the instructions were not complied with, the contractor claiming that it was impossible to do so and that he was doing all that he could do to begin work as early as possible.

When work was finally begun, on November 15, the season was so far advanced and the weather had

become so severe that he was compelled to stop, and on November 23 all work on both schedules was discontinued.

At the same time the contractor closed his camp and shop and has since done nothing towards getting ready for next season's work, although with the number of forms now on hand it will be impossible to start the plant at its full capacity when spring opens. No forms have been made for the tunnel shapes and nothing done towards getting ready for their manufacture.

In conversation with the engineers on January 1 the contractor stated that, owing to his poor financial condition, he was unable to begin work in preparation for next season, and that in all probability he would be unable to complete his contract this year or to resume operations at all.

Since that time Mr. Weisberger has endeavored to make arrangements with surety companies such that he could satisfy the Government as to his financial ability to carry his contract to completion, but he has today advised this office orally that he will be unable to do so, and he has withdrawn all objection to the suspensoin of the contract.

I therefore respectfully recommend that the contract be immediately suspended and that the United States take over the work, together with all machinery, tools, appliances, and animals employed on the work, and all materials and supplies of any kind shipped or delivered by or on account of the contractor for use in connection with the contract.

If the work is to be completed in time to have water in the Tieton Canal at the beginning of the irrigation season of 1909, the work must be taken in hand immediately and pushed to completion by the Reclamation Service without advertising for new bids, and it is believed at the present stage of the operations it would be impossible to secure reasonable bids for the completion of the work. I there-

fore recommend that the work under this contract be completed by force account.

Very respectfully,

MORRIS BIEN,
Acting Director.

Approved as recommended February 1st, 1908.

JAMES RUDOLPH GARFIELD,
Secretary.

We believe that a perusal of the foregoing instrument must convince the Court that it contains so many misstatements concerning the performance of the contract and what had been done by the contractor, that the Secretary of the Interior could not have other than an erroneous opinion of the matter, and that his action, based upon this communication, was necessarily taken under such a gross mistake regarding the facts as to prevent the exercise of a fair and unbiased judgment in the premises, and amounted to a constructive fraud upon the defendants. So far as appears from the record, the Secretary made no investigation and had no other report or information before him than that contained in this letter. It is very apparent that the letter was presented to the Secretary and he, relying upon his confidence in the Acting Director of the Reclamation Service, approved the recommendation without making any effort to ascertain the facts for himself.

The first reason for suspension given in the leter

of the Acting Director is that work on Schedule 6A was not commenced until August 2nd, 1907, that being the date the first shape was actually manufactured. We wonder if this official, sitting back in Washington, thought that Weisberger could commence manufacturing these shapes without any preliminary work. The uncontradicted evidence shows that Weisberger commenced work in December and had worked continuously from that time until the first shape was turned out. The evidence shows that this work was delayed several months by the action of the Government in failing to complete the road which it had agreed to construct, so that he could get his machinery on the ground for manufacture. Clearly the statement as to the date of commencing work is contrary to the facts.

The second reason given is that the contractor was repeatedly urged by the engineers to expedite the installation of his plant, and on October 9th written directions were given him to begin laying shapes, but the instructions were not complied with. Mr. Weisberger testifies (p. 227) and his testimony is not refuted, that he never received any notice to begin laying shapes as provided in the contract. The only directions which were ever given him in this regard by the Government engineers was the letter

of October 22nd (Trans. p. 72), in which he was advised to delay the laying of shapes until the matter of the cracks which were developing therein could be discussed by the District Engineer and the Supervising Engineer. About this date, the contract was extended, but he never received any notice to begin laying shapes.

The next statement is that when work was finally begun on November 15th, the weather had become so severe that the contractor was compelled to stop. The record shows that work had been going on for some time; that Weisberger had begun the work of placing the shapes in the canal prior to the receipt of the letter dated October 22nd; that the work was suspended at the request of the engineer, and subsequently without any demand upon the part of the Government engineers was voluntarily resumed and shapes were laid in the canal between the 10th and 20th of Novmber (Trans. p. 325).

The Director states that in conversation with the engineers on January 1st, the contractor stated that owing to his poor financial condition he was unable to begin work in preparation for next season. Mr. Weisberger testifies positively that he never made any such statement (Trans. p. 342).

The next statement is that Weisberger had stated

that he could not make financial arrangements and had withdrawn all objection to the suspension of the contract. Weisberger positively denies this and denies that he ever consented to or acquiesced in the suspnsion in any way, but was at all tims fighting to prevent suspension (Trans. p. 224).

The Government introduced absolutely no evidence in support of the statements contained in this letter of Morris Bein's to the Secretary, nor did it produce any evidence to rebut the testimony that was given by the defendants, which contradicted the statements in the letter. As the Lower Court ruled, the statements in the letter are no evidence against the defendants. As the record shows, practically every statement contained in this communication as a basis for the suspension of the contract, is not in accordance with the facts. How then, could the Secretary, in acting upon this communication, do otherwise than act under such a gross mistake as to the facts as to constitute a fraud upon the defendants?

It is further stated in the letter that the contractor has done nothing toward getting ready for the spring work and that with the number of forms on hand it will be impossible to start the plant at its fullest capacity; that the work must be taken in

hand immediately if the canal is to be completed in time for the irrigation season of 1909. Weisberger's testimony shows (Trans. pp. 218-19) that he had on hand about 240 forms and had ample time to construct others if nesessary; that he was engaged in hauling supplies and getting ready for next season's work but the Government had obstructed the road (Trans. pp. 378-360). The evidence further shows that the Government itself did not begin work until May and did not complete the canal until October 15th, 1909, after, instead of before, the irrigation season.

Apparently the Secretary read this communication, took up his pen and signed his name under the words "approved as recommended," without independent investigation of the facts and without any other or further knowledge than that which he obtained from the letter.

We submit that this was not such a performance of the duties which were entrusted to him under the terms of the contract as were contemplated; that he should not have acted on this letter without some investigation. Weisberger was in Washington trying to get an interview with him but could not do so (Trans. 344).

The Government was the first to default in the

performance of the contract in that it did not construct the wagon road or keep it open so as to enable Weisberger to carry on his work, and retarded the prosecution of the enterprise by its delay in building the road and in the preparation of the canal for receiving the lining. Having been the first to make default, the Government could not insist upon the strict performance of the contract by the contractor.

Anvil Mining Co. vs. Humble, 153 U. S., 540, 552;

U. S. vs. Peck, 102 U. S., 64;

Dist. Col. vs. Camden Iron Works, 181 U. S. 453, 463;

Itner vs. U. S., 43 Crt. Cls. Rep. 336, 351;

Blair vs. Wilkinson Coal Co., 54 Wash., 334, 351;

Standard Gas Light Co. vs. Wood, 61 Fed. R. 74;

King Iron Bridge Co. vs. St. Louis, 43 Fed. R. 718;

Erickson vs. U. S., 125 Fed. 887;

Landen Bank vs. Tenn. P. Co., 122 Fed. 298;

Dodd vs. Clinton, 1899, 12 B, 562, 567.

As is said by Justice Brewer in Anvil Mining Co. vs. Humble, supra:

"Generally speaking, it is true that when a con-

tract is not performed, the party who is guilty of the first breach, is the one upon whom rests all the liability for non-performnace."

As far back as the 17th century it is stated in Comyns' Digest, Condition L (6):

"So the performance of a condition shall be excused by the obstruction of the obligee; as, if a condition be to build an house; and he, or another by his order, binders the going upon the land. Or says that it shall not be built. Or interrupts the performance (1st Rol. 454, 1, 5, 20)."

We quote from Dodd vs. Clinton, supra:

"It is a well ascertained rule of law that where the failure of a contractor to complete the work by a specified day has been brought about by the act of the other party to the contract, he is exonerated from the performance of the contract by that date which has been thus rendered impossible. It has been often laid down that where there is provision that a contractor shall pay penalties for delay as in the present case, no penalty can be recovered where delay has been occasioned by the act of the persons endeavoring to enforce the penalties."

In Ittner vs. U. S., supra, Judge Atkinson, following the decisions of the Supreme Court of the United States, in U. S. vs. Peck, and District of Columbia vs. Camden Iron Works, above cited, says:

"It is well settled that where one of the parties to a contract demands strict performance as to time by the other party, he must comply with all of the conditions requisite to enable the other party to per-

form his part, and a failure on the part of the one demanding performance to do all the preliminary work required by him to enable the other party to complete the work within the time limit, operates as a waiver of the time provision in the contract."

In Arterial Drainage Co. vs. Rathangan Drainage Board, 6 Law Rep., Irish, 513, the engineer certified in accordance with the provisions of the contract that the contractor was not proceeding with the work with due diligence, and took possession of the work. The contractor claims that failure to make progress was due to the default of the other party in the performance of its duties under the contract. It was held that this being established was a complete reply, and the owner of the works had no right to take possession under the engineer's certificate.

This doctrine was reaffirmed in a case decided by the Judicial Committee of the Privy Counsel in 1904,

Lodder vs. Slowey, 1904 Appeal Cases 442, 452, 453:

"Their Lordships hold that a party to a contract for execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of the contractor has been brought about by the acts or default of the party himself, or his agent."

In McDonald vs. Can. So. Ry., 23 Upper Can. Queen's Bench, 313, in passing upon a provision for annulment upon the recommendation of the engineer for failure on the part of the contractor to make satisfactory progress, the Court said:

"The provision in this case, although it begins with the preamble before mentioned, does not, we think, constitute the engineer the judge or referee to decide whether or not the defendants did or did not delay the plaintiff in the course of his work. The engineer had plainly the right to detemine that in his opinion there were grounds to apprehend that the plaintiff would not complete his work in the manner and within the time specified; but if he came to that conclusion when and by reason of the plaintiff having been improperly retarded by the defendants or by the engineer himself, it would be an exercise in excess of his power."

In King vs. U. S., 37 C. Cls., 428, it was held that if the acts of the Government prevented the contractor from performing, an annulment of the contract by the engineer could not be sustained. Chief Justice Knot says:

"A contracting party cannot prevent his contractor from performing and then annul the contract because he has not performed."

In Harvey vs. U. S., 8 C. Cls., 501, the Court says:

"The ground of complaint was the tardy progress of the work which the defendants themselves produced, by neglect to furnish the working plans and

materials as they were bound under the contract. And now to justify the action of the officer of the Government in ejecting the claimants, would be to justify one breach of the contract by another, which no court can do."

The Government having been itself in default, and having caused a large part of the delay, it was certainly not acting in good faith when it attributed this delay to Weisberger as a basis for suspending the contract.

Furthermore, we think that there had practically been a waiver of any right to suspend by the Governmental officers until such time as it might be demonstrated in the opening of the season of 1908 that Weisberger could not perform the contract. The employees and engineers of the Government had acted all through the Fall in such manner as to lead Weisberger to believe that they did not intend to suspend the contract. The time of performance was extended on October 28, just before the work was shut down. It is held that there is an implied waiver of forfeiture, not only if notice to determine be not given within a reasonable time ,but if the owner acts in such manner as to raise the impression that he does not intend to determine the contract.

Marsden vs. Campbell, 28th Weekly Reporter, 952.

The notice was not sufficient, did not comply with

the provisions of the contract, and furnished no sufficient basis for the suspension.

Munday vs. U. S., 35 Ct. Cls., 265;

U. S. vs. O'Brien, 220 U. S., 321;

Champlain Construction Co. vs. O'Brien, 104 Fed., 930;

In contracts containing provisions for forfeiture, it is always implied that the public officer in whom this authority is vested, will not act arbitrarily or capriciously:

Ripley vs. U. S., 225 U. S., 695, 701;

U. S. vs. N. A. C. Co., 74 Fed. 145;

Chapman vs. Low, 4 Cushing, 378;

Kilberg vs. U. S., 97 U. S., 398;

Bowrey National Bank vs. Mayer, 63 N. Y., 336;

Hawkins vs. Graham, 149 Mass., 284;

L. E. & L. L. Ry. vs. Donnigan, 111 Ind., 179;

Blackwell vs. Borrough of Derby Supplement to 3rd Ed. Hudson on Bldg. Contracts, p. 29-30. (This is an English Court of Appeals case and we have not been able to find it in the reports.)

Utah Stage Co. vs. U. S., 39 Ct. Clms., 429, 439.

The party who has agreed to be bound by the judgment of the officer is entitled to have it exercised in good faith by the officer nominated, and cannot be bound by the substituted judgment of another authority.

U. S. vs. N. A. C. Co., supra;

Champlain Construction Co. vs. O'Brien, supra;

Harvey vs. U. S., 8 Ct. Cls., 50;

King vs. U. S., 37 Ct. Cls., 428;

Hawkins vs. Graham, 149 Mass., 284;

In the case of Ripley vs. U. S., above cited, the Supreme Court says in the decision:

"The contractor had no redress unless the action of the Secretary in suspending the contract was the result of fraud or such gross mistake as would imply fraud (citing Martinsburg & P. R. Co. vs March, 114 U. S. 549; U. S. vs. Mueller, 113 U. S. 153); but the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised, not capriciously or fraudulently, but reasonably, and with due regard to the rights of the contracting parties. The finding by the Court that the inspector's refusal was a gross mistake and an act of bad faith necessarily therefore leads to the conclusion that the contractor was entitled to recover damages caused thereby."

In U. S. vs. N. A. C. Co., supra, Judge Wallace says:

"It is not unusual for the contractor with the Government, as with other municipal bodies, to repose upon the good faith and discretion of some public officer who represents the Government and is responsible for the protection of its interests in the transaction. Such contractors frequently consent to stipulations by which the value of the contract is substantially controlled by the judgment of such an officer. In such contracts, however, it is implied that the public officer will not act arbitrarily or capriciously, but will exercise an honest judgment. The party who has agreed to be bound by that judgment is entitled to have it exercised in good faith by the officer nominated and cannot be bound by the substituted judgment of another authority."

So here we think if the Secretary of the Interior had made an investigation of the matter himself and not relied upon the representations of one of the Government officers who was really an interested party, that the result would probably have been very different. Instead of having the judgment of the Secreary of the Interior in this case, Weisberger really had the substituted judgment of the Acting Director of the Reclamation Service.

In Champlain Construction Co. vs. O'Brien, supra, the Court said:

"The exclusion of a person from his property under such proceedings is so contrary to common right that the provisions for them should be strictly followed, and these do not appear to have been so followed, nor to have afforded sufficient ground for taking it over."

As is said in a number of the cases cited, forfeitures are not favored in law, and unless enforced according to their letter and requirements, become inoperative.

In Williams vs. U. S., 26 C. Cls., 132, the Court says:

"The power of forfeiture must be construed strictly, and if any antecedent duty is omitted, an exercise of the power becomes unlawful as against the rights of the other party. * * * * * * It did not appear in that case, nor does it appear in this case, that a notice had been served on the claimant of the intended purpose of the Government to exercise the power of forfeiture contained in the agreement."

Counsel for plaintiff in error argue that because the trial court, in its opinion overruling the motion for judgment, stated that he found no evidence which would warrant the jury in finding that the Secretary of the Interior acted fraudulently or capriciously in suspending the contract, therefore there is only one issue before this Court, i. e., was the contract impossible of performance as made.

This statement in the opnion of the trial court doesn't limit the issues before this Court. Such opinion is no part of the record and cannot be considered. The Court submitted to the jury the question as to whether or not the Secretary acted fraud-

ulently or under a gross mistake of fact in suspending the contract. We do not claim that the Secretary was guilty of actual and deliberate fraud, but we do claim that he was negligent in the performance of the duty entrusted to him; that he did not make any proper investigation of the facts; that the statement put before him by the Acting Director was misleading and not in accordance with the facts. In accepting this statement and acting upon it, the Secretary was necessarily laboring under such a gross mistake as to the facts that it was impossible for him to exercise an honest judgment in the premises, and therefore the suspension was constructively fraudulent. The jury was warranted in finding for defendants on this issue and their verdict is not affected by the views of the trial judge expressed after the rendition of the verdict.

Nor is there anything in the contention that the two defenses are inconsistent. No objection was made to the introduction of evidence on this ground, nor was there ever any motion to require defendants to elect as to which defense they would stand on, nor demurrer to, nor motion to strike the affirmative defenses on the ground that they were inconsistent with each other or with the general issue pleaded. This being so, no question of "inconsistency" can now be raised.

In fact, the defenses are not inconsistent. If the contract could not be performed as made then it was the duty of the Government officials to allow such changes as would have made it possible, application for which were pending at the time of the suspension. If the plans, specifications and requirements of the Government engineers could not be carried out, this in itself was sufficient to stay the hand of the Secretary in suspending the contract and taking from the contractor his equipment and practically ruining him. Instead of taking the drastic action which was taken, the contractor should have been given an interview; and means should have been devised whereby he could go on with the work or else he should have been allowed to annul the contract and withdraw therefrom with his equipment and compensation for work done. Investigation on the part of the Secretary, or by some unbiased person for him would have revealed the true condition of affairs. If the contract as made by the Government was impossible of performance, or entered into under a mutual mistake of fact, then surely the Government was not entitled to seek to enforce it against the contractor and the action of the officials in excluding him from the work and taking possession of his equipment was fraudulent and unwarranted.

PERFORMANCE BY GOVERNMENT.

When the Government took over the contract and undertook to complete the construction of the canal, it demonstrated that it was impracticable and impossible to construct the canal according to the plans and specifications of the contract, and departed very materially from the plan of construction as therein provided. (See stipulation as to changes, Transcript Davis, p. 128-130-131; Heney, p. 160-161; Crownholm, p. 304; King, p. 329, 372.)

This testimony shows that when the Government did the work, the allowance in making the shapes true to radius was enlarged two or three times over the allowance made Weisberger by the inspectors; the form of the cross-bar was changed to give more strength to the shapes; instead of requiring the shapes to be brought practically together and jointed with a joint only one-eighth of an inch in ~~thickness~~ width, the joint was allowed to be made whatever width might be necessary to follow the line of the canal and make a smooth surface, the joints varying from 1½ to 6 inches in width, thus making it practicable to so place the shapes that the line of the canal could be followed and the projections in the interior overcome by bevelling these joints. Many other changes were made, as is shown by the stipulation as to

changes, among which was the changing of Log Slide Tunnel, 1000 feet in length, to an open cut, increasing the length to 2394 feet; Weddle Tunnel, 440 feet in length, was changed to an open cut; tunnels at Stations 515 and 530 were changed to open cut; Trail Creek Tunnel, 3120 feet in length, was lined with monolithic lining instead of shapes; all of the flumes and flume supports were cut out, rock fills being substituted; many other changes were made. In fact, there was practically an entire change in the method of lining the canal and a very wide departure from the original plans.

To entitle the Government to recover against the defendant in this case, it was necessary to show that when it took over the work it performed substantially the same contract as that which Wesiberger had agreed to perform. If there was any substantial departure therefrom, the Government could not recover the excess cost, if any, because the work done by it being other than that which the contractor had undertaken to perform, there would be no way of determining the difference in cost.

Moody vs. U. S., 35 Ct Cls., 265, 288;

American Bonding Co. vs. Gibson, 127 Fed. R., 671, 674;

While it is true that the contract provides that changes may be made, yet this provision is only applicable when the contractor is performing the contract. If the Government saw fit to take the contract out of his hands and perform it itself, it had no right to make any material changes, but was bound to construct the canal as provided for in the contract. If it was impossible to do this, then certainly the Government could not do other and different work than that provided in the contract and seek to hold the contractor for the difference. If this were permissable, there would be no protection whatever for the contractor; it would enable the Government officials to take out of his hands the performance of the contract and do other and different work, the cost of which might be greatly in excess of that which he had agreed to do. It is apparent that this might give rise to the greatest injustice. When a man signs a contract such as the one under consideration in this case, and gives to the Government and its officials the power and control which is herein given, he has a right to rely upon the presumption that the Government officials will act in good faith and in accordance with the spirit and intent of the contract. Otherwise, the contractor might as well have no contract at all and merely agree that,

upon demand, he will turn over all of his equipment to the Government, and allow it to do as it sees fit therewith, and pay whatever the Government officials may see fit to charge him with. As was said by Chief Justice Knot in Utah Stage Co. vs. U. S., 39 Ct. Cls., 420-439:

"To hold otherwise, would be to hold that this carefully prepared contract with the elaborate specifications thereto annexed, might be reduced to three lines: The undersigned in consideration of $....., covenants and agrees that during the next four years he will do whatever the Post Office Department bids him."

This case was affirmed in 199 U. S., 414.

If the verdict of the jury in this case had been set aside, judgment could not have been entered for the plaintiff in error, as the Government failed to prove facts sufficient th sustain its action against the defendant, Weisberger. Under the issues as made by the pleadings, it was incumbent upon the Government to prove performance of the contract on its part—that it had constructed and repaired the wagon road which it agreed to construct before the contractor was bound to begin work; that it had done the work under Schedules 1, 2, 3, 4, and 5, which was necessary to be done before the contractor could be required to begin the laying of the shapes in the canal; that the work done by it was the work which

Weisberger had agreed to perform; what amount of moneys it expended therein and for what the money was expended.

It is true that the contract, Sec. 8, provides that upon all questions concerning the execution of the work, the classification of the materials, and the determination of costs, the decision of the chief engineer shall be binding on both parties, but we think that this can only mean that his decision and determination of costs shall be binding when the work is done by the contractor. It would be going altogether too far to say that the Government can charge the contractor with whatever cost the chief engineer may determine without any evidence as to the reasonableness thereof, when the work has been taken out of the contractor's hands and is being done by the party whose servant this engineer is. The contractor had no longer any right to be upon the work or any means of determining the reasonableness of such cost. This is a very different situation than when the contract is re-let to another contractor, for then the price of the second contract establishes the cost.

As stated in defendant's motion for non-suit (Trans. p. 137) the Government failed to prove the performance of the contract on its part; failed to

prove what work it did or what moneys it expended, or what was the reasonable cost of any work which it did—or that it had not been reimbursed for any moneys which it may have expended. The only evidence which the Government introduced was a lot of cost sheets which were not identified or proven by anyone having any knowledge thereof. Mr. Davis, the chief engineer, was put on the stand to testify that he had determined and certified this cost, but Davis testified that he had not approved the determination as to cost in the regular manner, that he did not make the original entries or have any knowledge thereof, except what he had received from his subordinates. Mr. Davis testified as to how such costs are regularly certified. But no such certification in regular form signed by the proper officer was offered by plaintiff. (Trans. pp. 102-113.) Under no rule of evidence would this testimony have been admitted if a private individual were seeking to prove an account.

Chafee vs. U. S., 85 U. S. 516.

We do not understand why it should be accepted as evidence in favor of the Government in a case like this, and especially why it should be accepted as final and conclusive. When the Government institutes a suit against an individual, it places itself up-

on the same footing as any other litigant and is bound by the same rules of evidence. The Government should have been required to either produce the parties who did the work and had knowledge thereof and of its cost, or else to have produced the accountants who made the original entries in regard to these transactions. At least it should have introduced a cost statement certified and proved in the manner provided by law. Defendants had a right to know, and it was the duty of the Government to prove what moneys had been expended, and for what they were expended, and this proof should have been made in some manner recognized by the rules of evidence. The trial court stated that it was "under the impression the proof is a little lame." It was more than lame—it couldn't and shouldn't have been allowed to stand unsupported. Nor could it be strengthened by the presumption that the accounts were correct because made by public officials who are presumed to have done their duty. Such presumption does not supply proof of a substantive and material fact and is never held to be a substitute for such proof.

U. S. vs. Carr, 132 U. S., 644, 653.

U. S. vs. Ross, 92 U. S., 281.

The equties of this case are all with the defendant.

The Government has had the benefit of all the contractor's efforts and equipment. The verdict of the jury is sustained by the evidence and we respectfully submit that the judgment entered on such verdict should be affirmed.

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